

**INVENTOR:** HUXEL, Edward T.  
**Serial No.** 10/047,579

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## **REMARKS**

### **Issues Raised in the Office Action**

Claims 1-12 currently are pending in the application. Claims 1-12 were rejected under the judicially created doctrine of obviousness-type double patenting. Claim 7 was rejected under 35 U.S.C. 102(b) as being rejected by Miller et al. [Pat No. 5,431,945]. No other claim rejections were re-stated, and therefore are understood to have been withdrawn.

### **Priority**

The priority statement of this case has been amended to recite that Application No. 09/659,530 filed September 12, 2000, has now issued as U.S. Patent No. 6,649,202.

### **Terminal Disclaimer**

A Terminal Disclaimer is submitted herewith as a separate paper. A check in the amount of \$110.00 is provided with that paper. It is believed the Terminal Disclaimer removes U.S. Patent No. 6,649,202 as a reference, thus making moot its combination with Miller et al [Pat. No. 5,431,945] and the rejection based thereon.

Check No. 14055 for \$110.00 in payment of the Terminal Disclaimer fee is enclosed.

### **Information Disclosure Statement**

The examiner stated that Paper No. 2 of the IDS titled: Bailey's Industrial Oil and Fat Products, does not include a publishing date. The applicant is unable to locate a publishing date for that publication.

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### Claim Rejection Remarks

**Claim 7 was rejected under 35 U.S.C. §102 as being unpatentable over Miller et al.**

Miller et al. was cited as art which anticipates the present claim under 35 U.S.C. §102. The applicant believes this rejection is traversed by the following amendment to claim 7 at lines 4-5:

- -selecting a liquid mixture consisting essentially of  
~~comprising~~ a fat, said mixture having a solids fat index - -

The open language of "comprising" has been removed and the more limiting statement of "a liquid mixture consisting essentially of a fat" has been included.

The Applicant believes Miller et al. does not anticipate amended claim 7. Miller achieves the ability to produce a flake from butterfat by combining "about 20% to about 60% of dry dairy solids" with the butterfat. (See, Declaration of Edward T. Huxel, attached). Amended claim 7 by reciting "a liquid mixture consisting essentially of a fat, limits the "liquid mixture" of claim 7 to the specified materials or steps "and those that do not materially affect the basic and novel characteristic(s)" of the claimed invention. (*In re Herz*, 537 F.2d 549, 551-52, 190 USPQ 461, 463 (CCPA 1976)(emphasis in original)).

Therefore, the Applicant believes that the aspect of Miller which involves the addition of dry dairy solids to the Miller et al. mixture can no longer be considered to be within the scope of claim 7.

In support of this distinction, the Declaration of Edward T. Huxel, the inventor, is provided. Mr. Huxel is, through education and experience, an expert in the process and packaging of fats and oils. (The Huxel Declaration is being filed unsigned as the

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inventor is traveling and cannot execute the Declaration. Mr. Huxel's approval of the contents of the Declaration is on file with his attorney. A signed version will be promptly filed).

Mr. Huxel states at paragraphs 9-14 of his Declaration that the addition of the 20% to 60% dry dairy solids into the Miller et al mixture is necessary to enable the Miller mixture to become solidified at the cooling temperatures identified in Miller 5 degrees C, (41 degrees F) to 12 degrees C (54 degrees F). Mr. Huxel further states in paragraph 14 that the addition of such quantities of dry dairy solids would prevent the Miller flakes from acting as a shortening.

Therefore, as amended, claim 7 no longer allows for the addition of the large quantity of dry dairy solids of Miller et al. It is believed that amended claim 7 now distinguishes over Miller et al. and anticipation is avoided.

The Applicant believes that all claims are now in condition for allowance.  
Reconsideration of the application as amended respectfully is requested.

Respectfully submitted,



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**PATENT**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Date:	May 28, 2004
Serial No.:	10/047,579
Filing Date:	January 15, 2002
Applicant:	HUXEL, Edward T.
Title:	COATED FLAKED FATS
Examiner:	Becker, D.
Art Unit:	1761

Hon. Commissioner of Patents  
Alexandria, VA 22313-140

Sir:

**DECLARATION OF EDWARD T. HUXEL**

I, Edward T. Huxel, having personal knowledge of the following facts, do hereby declare as follows:

1. I, Edward T. Huxel, live at 7513 Lake Highland Dr., Ft. Worth, TX 76179.
2. My educational background includes the following degrees and certifications:
  - Ohio State University, B.S. Food Science 1971;
  - Oregon State University, M.S. Food Science 1973;
  - University of California, Davis, M.S. Food Engineering 1976;
  - Certified Baker, "Sweet Goods" American Institute of Baking.

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3. My professional experience in the food and baking industries is:  
1973 to 1975 - Oxnard Frozen Foods Coop. Quality Control Inspector and  
Capital Projects Coordinator;  
1976 to 1977 - Hueblien Inc. (Nabisco) Process Engineer;  
  
1977 to 1979 - Lawry's Foods (Liptons) Director of Corporate Quality  
Assurance and Process Engineering.  
1978 to 1981 - Wilsey Foods, Inc.(Ventura Foods)  
Operations Manager and Project Engineer.  
Wilsey packaged fats, margarine, and oils for the institutional  
and retail markets.  
1981 to Present Inland Products, Inc.  
Co-owner and Vice President, Technical.  
Manufacture of specialty shortenings.
4. I have over 24 years in the processing and packaging fats and oils beginning with my employment with Wilsey Foods (now, Ventura Foods). In my years of overseeing the processing and packaging of fats and oils I have designed and installed a number of fat and oil processing facilities. In 1991, I installed a chilling roller system to flake shortening. In approximately 1994, I designed and built a separate facility with four rollers to make flaked shortenings for customers through out the US and Europe.
5. During my 24 years of processing and packaging fats and oils I have conducted research on flaking different fats, shortenings, shortenings blended with solids and emulsifiers. My research has included work on producing flakes from shortenings that had SFI profiles below the agglomeration boundary including butter, margarine, and all purpose shortening.

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6. My education and experience have provided me with a level of expertise that enables me to make the following observations, as an expert in oils and fats processing, with regard to the contents of Miller et al., U.S. Patent No. 5,431,945.

7. My examination of Miller et al. shows that it teaches the production of a butter based product which comprises from substantially 0% to 2 % moisture, from about 20 % to 60% dry dairy solids, with a balance being butter fat having less than 1 % moisture content.(See, Miller at Col. 2, Ln. 37-43; Col. 5, Ln. 3-7; Claim 1, Col. 10-11, Ln. 65-15).

8. During my years of work in the processing of fats and oils, I have flaked a product containing approximately 12 % cinnamon powder and 10 % powdered sugar blended with a shortening having an SFI profile that has approximately the same SFI as the agglomeration boundary. It is my experience that it is the inclusion of the solids to the product that allows flakes to be produced at a higher production rate than if the product composition had no solids added to the mixture. This comparison assumes the same operating conditions for both instances. (Roller surface temperature at 7°F to 17°F).

9. My experience and expertise in the processing of fats and oils leads me to conclude that the addition of solids by Miller et al. was necessary in order for Miller et al. to produce a flake at the cooling temperature stated in Miller et al.-- specifically 5°C(41°F) to 12°C(54°F). (See, Miller at Col. 8, Ln. 32-36).

10. It is my conclusion, based upon my years of experience in the processing of fats and oils that Miller et al. would not be able to flake 100% butter oil commercially using the method he proposed at the temperatures of 5°C(41°F) to 12°C(54°F). At these conditions, an excessively long tunnel or extremely slow production rate would be required which would not be commercially feasible. I have found this to be the case based upon my own work and research when flaking shortening having a SFI profile below the agglomeration boundary.

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11. If Miller et al. were to flake 100% butter oil, (i.e., no inclusion of solids in the mixture) it would be necessary to take action to prevent the agglomeration of the flaked produced. Miller et al. does not teach any provisions to prevent agglomeration at the temperature. Normally, butter would be stored at below 0°C (32°F). At his processing temperature, the finished flake of Miller et al. would stick together in clumps.

12. By contrast to Miller et al. my invention allows:

- a. a shortening flake to be made without the addition of any of powdered solids(20% to 60%);
- b. the flake can consist of more the 2% moisture such as margarine with 18% moisture; and
- c. a coating to be added to prevent the agglomeration after packaging problem that Hansen would incur.

13. These advantages of my invention allow the coated shortening flakes to be substituted for cubed shortening in a bakery product without affecting the texture, taste, or appearance of the product and without affecting the baking process.

14. My expertise and years of experience in the processing of fats and oils that Miller et al. lead me to conclude the following regarding the Miller et al. teachings:

- a. The product taught by Miller et al. and called Dry Butter Based Flake requires the addition of 20% to 60% solids to form flakes with the process described in Miller et al.;
- b. The Miller et al. product can contain a maximum of 2% moisture. If the moisture content is higher, the solids will clump or the presence of high moisture levels would produce a continuous mass that would not flake; and

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c. The purpose of Miller et al. product is the addition of butter flavor to bakery products. As the fat portion of the Miller product has been modified by the addition of dry dairy solids it can no longer function as a substitute for a solid shortening in traditional bakery product as the shortening properties have been lost due to the inclusion of the dry dairy solids component.

### **DECLARATION**

The undersigned being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of this document, declares that he is properly authorized to execute this document; and all statements made of his own knowledge are true and that all statements made on information and belief are believed to be true.

Date: \_\_\_\_\_

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EDWARD T. HUXEL